Supreme Court, U.S.
FILED
JUN 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM 1979

No. 79-2084

SAN ANTONIO PORTLAND CEMENT COMPANY,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD

AND

UNITED CEMENT, LIME AND GYPSUM WORKERS INTERNATIONAL UNION
AFL-CIO
*Respondents.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Bowne of Houston, Inc. Printed in U.S.A.

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# APPENDIX A

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

v.

SAN ANTONIO PORTLAND CEMENT COMPANY,

*Respondent.*

No. 79-2576

SUMMARY CALENDAR.*

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

FEB. 15, 1980.

**APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

Before GODBOLD, REAVLEY and ANDERSON, Circuit Judges.

PER CURIAM:

This case comes before this Court upon application by the National Labor Relations Board ("Board") for enforcement of its order against San Antonio Portland Cement Company ("Company") which found the Company in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, for refusing to bargain with the United Cement, Lime & Gypsum Workers, International Union ("Union"). The Union, after the representation elec-

tion, had been certified by the Board as the exclusive bargaining representative of the Company's employees in the appropriate bargaining unit. The Company challenges the Order of the Board on the grounds that supervisory involvement on behalf of the Union rendered the election results invalid. We find from the record there is substantial evidence to support the Board's order, and it is therefore enforced.

On March 17, 1978, based on a stipulation executed by the parties, an election was held in the production and maintenance unit of the Company. The Union won. The Company timely filed three objections to the election, only one of which the Company now urges. That objection is that employees Gregory Fuentes, Joe Fernandez and Curtis New are all supervisors, and all three coerced and intimidated employees on behalf of the Union prior to the election.

A Hearing Officer, after receiving testimony concerning this objection, found in his Report that neither Fuentes nor Fernandez was a supervisor, and that New's conduct did not impair the employees' freedom of choice in the election. He recommended that the Company's objection be overruled. The Board adopted the Hearing Officer's findings and recommendations.

A recurrent issue in contests of representation elections is whether a particular employee is a "supervisor".[1] This Court in considering such a question gives great weight to

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1. Section 2(11) of the Act, 29 U.S.C. § 152(11) defines a "supervisor" as:

> ... [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment.

the Board's determination, since the Board, in light of its expertise, is uniquely capable of measuring the subtle gradations of authority which delineate supervisory from non-supervisory personnel. *N.L.R.B.* v. *Handy Hardware Wholesale, Inc.*, 542 F.2d 935 (5th Cir. 1976); See also *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944), and *N.L.R.B.* v. *Houston Natural Gas Corp.*, 478 F.2d 467 (5th Cir. 1973); *cert. denied*, 414 U.S. 1067, 94 S.Ct. 575, 38 L.Ed.2d 472. Mindful of the weight to be given the Board's determinations, we turn to the status of Fuentes and Fernandez.

**A. STATUS OF GREGORY FUENTES.**

The Company maintains on its premises, but apart from its plant, a section known as the Village, consisting of approximately 80 houses offered to the employees on a space available basis. Fuentes, who is classified as Carpenter & Utility Leadman, is part of a crew of three or four men, which is responsible for the maintenance of the Village. The crew reports to the Plant Superintendent Canchola each morning, at which time they pick up a work sheet covering the day's work. Although the men work as a crew, each possesses a skill in some specific area of construction. For example, one is the plumber, one is the painter and Fuentes is the carpenter. The crew usually divides up the work based on their skills, and as the work progresses, a member of the crew marks off the job on the sheet. Fuentes is the highest paid member of the crew by 13 or 14 cents. He otherwise receives the same benefits as other hourly paid employees. His job consists of manual labor.

Fuentes testified that he had no supervisory authority and denied that he had any authority to hire or fire employees, grant wage increases, lay off or recall employees. He did recount that he once told management that a certain

member on the crew was a good worker, and that this crew member later received a wage increase. The record, however, failed to establish that the wage increase was the result of Fuentes' recommendation. Fuentes also explained that during the preparation of the Christmas party, he would submit to Canchola names of people he would like to have assigned to him on the project, but that Canchola would strike or add names as Canchola desired. Fuentes also testified that at one time he requested a certain employee for a job, which request was granted.

The Company, to establish Fuentes' supervisory status, placed Manuel Galindo, the Personnel Manager, on the stand. Galindo testified that Fuentes did have authority to assign jobs to the men on the crew and to order laborers to assist the crew in their work in the Village. The Hearing Officer, however, noting that Galindo was not as familiar with Fuentes' job as Fuentes himself, expressly credited Fuentes' testimony over that of Galindo, and found that Fuentes did not possess or exercise authority to hire, fire, lay off, recall, promote or discipline employees, and also that Fuentes did not possess authority to assign or direct work of others except in routine matters requiring little or no independent judgment. The Board adopted these findings.

We find that there is substantial evidence in the record as a whole to support the Board's finding that Fuentes was not a supervisor.

**B. STATUS OF JOE FERNANDEZ.**

The Company operates on a 24 hour basis a power plant with 12 engines to supply electricity for its operation. Anywhere from 17 to 21 employees work in this plant. Chief Engineer Efren Charles is in charge of the power plant, and Assistant Chief Engineer Curtis New is next in charge.

Fernandez, who has the title Chief Diesel Engineer Operator, stated in testimony before the Hearing Officer that he possesses no supervisory authority and has no authority to hire, fire, lay off, promote, grant time off, issue warnings, or discipline employees. He stated he does not participate in preparing the work schedules of the powerhouse employees. His duties are to take care of four large diesel engines in the plant and to assist operators of machines other than his four large diesels in starting their mechines and getting them to run normally. All of his time is spent on manual labor, performing tasks such as checking lubricators and oil levels, cleaning the generator pits and oil spills, assisting the maintenance crew, and doing other minor clean up chores. On occasion operators have called Fernandez for advice while he was home, but the Hearing Officer found that he lacks authority to direct operators. Fernandez does have authority to make an on-the-spot decision to shut down an engine when it is in extreme danger of damage, but all operators and mechanics have this authority.

The Company relies on the testimony of Galindo who stated that Fernandez does have authority to prepare a rotating crew schedule, to give overtime, to leave instructions for the night shifts, and to call employees in if there is an emergency.

The Hearing Officer found that Fernandez did not possess or exercise the authority to direct the work of other employees. His basic responsibility is the maintenance of the diesel engines. The Board adopted these findings. We find that there is substantial evidence in the record as a whole to support the Board's finding that Fernandez was not a supervisor.

**C. PRO-UNION ACTIVITY OF NEW.**

The only pro-union activity by New alleged by the Company is that on the night before the election, he wore a

Union button while attending a Union meeting adjacent to a Company picnic. No other activity or pressure is alleged by the Company.

While it has been stated that supervisory pressure upon employees in the selection of a bargaining representative is coercive and that it is not necessary to prove that such pressure and coercion affected the result of the election, *Turner's Express, Incorporated* v. *N.L.R.B.*, 456 F.2d 289 (4th Cir. 1972), this Circuit has clearly held that not just any advocacy of a union by a supervisor rises to the level of supervisory pressure or coercion. The mere statement of personal preference by a supervisor is not coercive. *N.L.R.B.* v. *Alamo Express, Inc.*, 430 F.2d 1032 (5th Cir. 1970). In upholding the Board's bargaining order grounded on an authorization card majority, we have held there is no supervisory taint so long as nothing in the words, deeds or atmosphere of a supervisor's request for authorization cards contain the seeds of potential reprisal, punishment, or intimidation. *N.L.R.B.* v. *WKRG-TV, Inc.*, 470 F.2d 1302, 1316 (5th Cir. 1973).

The only fact in this case from which we are urged to infer supervisory coercion is the fact that one supervisor wore a Union button at a Union meeting on the eve of the election. This fact is very similar to the expression of personal preference which *Alamo Express, Inc., supra,* found not to be coercive.

*Turner's Express, supra,* cited by the Company, is distinguishable. In *Turner's Express,* the supervisors were responsible for bringing in the Union, had interrogated employees as to whether they would sign authorization cards, had told some employees they would be "crazy" not to sign the authorization cards, and had warned some employees that if they voted against the Union, things were going to get tough and those employees would "start paying for it" after the election.

*N.L.R.B.* v. *Lamar Electric Membership Corporation,* 362 F.2d 505 (5th Cir. 1966), is also distinguishable. In *Lamar Electric,* not only did a supervisor join a Union meeting on the eve of an election, but there was also evidence that he had attended a previous Union meeting, that he had brought the crews into the plant earlier than usual on the day of the election, that he had attended a Union celebration on the night of the election, that he had made threats of economic and physical harm to one employee who had voted against the Union on the day after the election, and that he had stated two days before the election: "the only way we're ever going to have anything is to have a union because the board isn't going to do a thing for us and if we get anything we'll have to get it for ourselves." This Court held that this evidence made out a prima facie case of supervisory coercion that required a hearing. Unlike the *Lamar Electric* case, an evidentiary hearing has been held in this case.

In both *Turner's Express* and *Lamar Electric,* the supervisor's acts contained seeds of potential reprisal and intimidation. On the other hand, attending a Union meeting wearing a Union button, without more, does not contain such coercive seeds. The Hearing Officer found that New's wearing the Union button at the Union meeting on the eve of the election failed to coerce the employees.[2] We find substantial evidence in the record as a whole to support this finding.

The order of the Board that the Company bargain with the Union is therefore

ENFORCED.

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[2] The Hearing Officer also found that New was a "low-level" supervisor, and that his authority extended only over a very insignificant number of total unit employees.

# APPENDIX B

CASE 23—CA—7261

# UNITED STATES OF AMERICA
# BEFORE THE
# NATIONAL LABOR RELATIONS BOARD

SAN ANTONIO PORTLAND CEMENT COMPANY

AND

UNITED CEMENT, LIME & GYPSUM
WORKERS, INTERNATIONAL UNION,
AFL-CIO

## DECISION AND ORDER

Upon a charge filed on October 3, 1978, by United Cement, Lime & Gypsum Workers, International Union, AFL-CIO, herein called the Union, and duly served on San Antonio Portland Cement Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 23, issued a complaint on October 13, 1978, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 8, 1978, following a Board election in Case 23-RC-4611, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about September 25, 1978, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, and to furnish relevant and necessary bargaining information, although the Union has requested and is requesting it to do so.[2]

On November 9, 1978, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and submitting an affirmative defense.

On November 24, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Thereafter, on November 30, 1978, Respondent filed a response to General Counsel's motion. Subsequently, on December 7, 1978, the Board issued an order transferring

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[1] Official notice is taken of the record in the representation proceeding, Case 23–RC–4611, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] Although the complaint does not allege that the Union specifically requested bargaining with Respondent, the Union did request that Respondent furnish it with information relevant to the bargaining process. The Board has found that such a request constitutes a request for bargaining. Therefore, Respondent's refusal herein to provide the information sought by the Union constitutes a refusal to bargain. See, e.g., *Richmond, Division of Pak-Well*, 206 NLRB 260 (1973).

the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On December 19, 1978, Respondent filed a letter as a response to Notice To Show Cause, incorporating therein its response to General Counsel's Motion for Summary Judgment previously filed.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

## RULING ON THE MOTION FOR SUMMARY JUDGMENT

In its answer to the complaint, response to the General Counsel's Motion for Summary Judgment, and response to Notice To Show Cause, Respondent denies the validity of the Union's certification based on (1) its election objection alleging improper organizational activities of certain of its supervisors;[3] (2) its contention that a proper tally of the votes cast cannot be made as the one "void" ballot allegedly tallied as a challenged vote was, in fact, counted separately, and is therefore missing, leaving the remaining callenged ballots determinative of the election; and (3) its denial of the appropriateness of the certified unit. In its Motion for Summary Judgment, counsel for the General Counsel alleges that Respondent seeks to relitigate issues previously considered in the underlying representation case and that there are no factual issues warranting a hearing. We agree.

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[3] This issue of supervisory organizational activity on behalf of the Union was stated as an affirmative defense by Respondent in its answer to the complaint.

Review of the record, including that of the representation proceedings in Case 23—RC—4611, shows that upon a Stipulation for Certification Upon Consent Election, an election was held on March 17, 1978. The tally of ballots disclosed 98 votes for and 72 against the Union, leaving determinative the 39 challenged ballots, including one void ballot. Thereafter on March 24, 1978, Respondent filed timely objections to conduct affecting the results of the election, alleging essentially that supervisory employees assisted the Union by engaging in organizational activities, such as, *inter alia,* soliciting authorization cards, attending and/or conducting union organizational meetings, and distributing compaign literature.[4] On April 27, 1978, after investigation, the Regional Director issued his Order Directing Hearing and Notice of Hearing, finding that substantial and material issues of fact, credibility, and policy were raised by the challenged ballots and Respondent's Objection 3.

After a hearing, on July 13, 1978, the Hearing Officer issued his report in which he (1) sustained the Petitioner's challenge to the one void ballot; (2) found that since the parties agreed to the sustaining of challenges to 14 additional ballots, the 124 remaining challenged ballots were insufficient to affect the results of the election; and (3) concluded that Respondent's objection had no merit as two of the employees alleged as supervisors did not possess supervisory authority, and the third, who is a low-level supervisor, did not engage in any conduct which would impair the employees' freedom of choice in the election. There-

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[4] The Respondent's original election objections also contained the allegations that (1) the Union intimidated and threatened eligible voters with reprisals unless they signed authorization cards and/or voted for the Union, and (2) that the Union was responsible for defacing NLRB sample ballots thereby making it appear that the Board endorsed the Union. These objections were withdrawn on April 26, 1978, with the approval of the Regional Director.

after, on August 2, 1978, Respondent filed exceptions to the Hearing Officer's Report and Recommendations, seeking a second election.[5] On August 16, 1978, the Union filed an answering brief to Respondent's exceptions. On September 8, 1978, after considering the record in light of the exceptions and briefs, the Board issued its Decision and Certification of Representative which adopted the Hearing Officer's findings and recommendations, and certified the Union.[6]

In its Response to the General Counsel's Motion for Summary Judgment and Response to Notice To Show Cause, Respondent contends that it is entitled to a further hearing before an Administrative Law Judge with respect to the issues of the supervisory status of alleged union agents and their purportedly coercive conduct, and the validity of the tally. We disagree.[7] During the course of the representation proceeding, which included a hearing, all parties were afforded the opportunity to be heard and present evidence and witnesses. Further, in reviewing the entire record and adopting the Hearing Officer's findings and recommendations regarding the challenges and the objection, the Board found that Respondent's objection and exceptions were without merit. Respondent now raises issues it previously raised in the representation case in an attempt to obtain an additional hearing, but it is well established that there is no requirement that an evidentiary hearing must be held where there are no substantial or material issues.[8]

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[5] Respondent, however, failed to specifically except to any of the Hearing Officer's findings and recommendations with respect to the challenged ballots, including the one "void" ballot.

[6] On October 3, 1978, the Board also issued an Order correcting an inadvertent error in the unit description.

[7] *Locust Industries, Inc.*, 221 NLRB 604 (1975).

[8] *Janler Plastic Mold Corporation*, 191 NLRB 162 (1971).

Further, it is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[9]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we shall grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF RESPONDENT

Respondent, a Texas corporation with its principal office and place of business in San Antonio, Texas, is engaged in the manufacture of cement and related products. During the past year, a representative period, the company purchased and received in excess of $50,000 worth of products directly from suppliers located outside the State of Texas.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6)

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[9] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

## II. THE LABOR ORGANIZATION INVOLVED

United Cement, Lime & Gypsum Workers, International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

### A. THE REPRESENTATION PROCEEDING

#### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed at the Employer's Cementville Plant located in San Antonio, Texas, including all employees in the Quarry Department, Shipping Department, Kiln Department, Finishing Mill Department, Slurry Mill Department, Powerhouse Department, Plant Office Department, Maintenance and Repair Department, Electrical Department, Laboratory Department, Oiler Subsection, as well as plant clerical employees, leadmen, truckdrivers, and mechanics, excluding office clerical employees, order clerks, guards, watchmen, and supervisors as defined in the Act.[10]

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[10] In its answer, Respondent denies the appropriateness of the certified unit. However, in the Stipulation for Certification Upon Consent Election, Respondent stipulated that this unit was appropriate. Further, the Board so found in its Decision and Certification of Representative. In view of the fact that Respondent fails to substantiate its denial and change of position, we find no merit in its current stance, raised for the first time in these proceedings, that the unit is not an appropriate one. See *Golden Age Beverage Co., supra* at fn. 1.

**2. The certification**

On March 17, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 23, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on September 8, 1978, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

## B. THE REQUEST TO BARGAIN AND RESPONDENT'S REFUSAL

Commencing on or about September 15, 1978, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit and to furnish it with relevant and necessary bargaining information concerning the employees in the above-described unit, including, but not limited to, the employees' names, classifications, rates of pay, and dates of hire, as well as copies of the benefit programs of said employees. Commencing on or about September 25, 1978, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit and to furnish relevant and necessary bargaining information.

Accordingly, we find that Respondent has, since September 25, 1978, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and to furnish relevant and necessary bargaining information, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement, and furnish the Union, upon request, relevant and necessary bargaining information concerning the employees in the appropriate unit, including, but not limited to, the employees' names, classifications, rates of pay, and dates of hire, as well as copies of the benefit programs of said employees.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Con-*

*struction Company,* 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

## CONCLUSIONS OF LAW

1. San Antonio Portland Cement Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Cement, Lime & Gypsum Workers, International Union, AFL — CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed at the Employer's Cementville Plant located in San Antonio, Texas, including all employees in the Quarry Department, Shipping Department, Kiln Department, Finishing Mill Department, Slurry Mill Department, Powerhouse Department, Plant Office Department, Maintenance and Repair Department, Electrical Department, Laboratory Department, Oiler Subsection, as well as plant clerical employees, leadmen, truckdrivers, and mechanics, excluding office clerical employees, order clerks, guards, watchmen, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 8, 1978, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 25, 1978, and at all times thereafter, to bargain collectively with the above-

named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, and to furnish relevant and necessary bargaining information concerning said employees, including but not limited to, the employees' names, classifications, rates of pay, and dates of hire, as well as copies of the employees' benefit programs, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, San Antonio Portland Cement Company, San Antonio, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Cement, Lime & Gypsum Workers, International Union, AFL — CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees employed at the Employer's Cementville Plant located in San Antonio, Texas, including all employees in the Quarry Department, Shipping Department, Kiln Department, Finishing Mill Department, Slurry Mill Department, Powerhouse Department, Plant Office Department, Maintenance and Repair Department, Electrical Department, Laboratory Department, Oiler Subsection, as well as plant clerical employees, leadmen, truck-drivers, and mechanics, excluding office clerical employees, order clerks, guards, watchmen, and supervisors as defined in the Act.

(b) Refusing to furnish relevant and necessary bargaining information concerning employees in the above described unit, including, but not limited to, the employees' names, classifications, rates of pay, and dates of hire, as well as copies of the employees' benefit programs.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement and, upon request, furnish relevant and necessary bargaining information concerning the employees in the aforesaid appropriate unit, including, but not limited to, the employees' names, classifications, rates of pay, and dates of hire, as well as copies of the employees' benefit programs.

(b) Post at its San Antonio, Texas, facility copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. March 5, 1979

. . . . . .

JOHN H. FANNING, Chairman

. . . . . .

JOHN A. PENELLO, Member

. . . . . .

JOHN C. TRUESDALE, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

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[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

## APPENDIX

## NOTICE TO EMPLOYEES

**Posted By Order of the**
**National Labor Relations Board**
**An Agency of the United States Government**

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Cement, Lime & Gypsum Workers, International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to furnish the above-named Union with relevant and necessary bargaining information concerning employees in the bargaining unit described below, including, but not limited to, the employees' names, classifications, rates of pay, dates of hire, as well as copies of the employees' benefit programs.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement, and, upon request, furnish the Union with relevant and necessary bargaining information concerning the employees in the bargaining unit described below, including, but not limited to, the employees' names, classifications, rates of pay, and dates of hire, as well as copies of the employees' benefit programs. The bargaining unit is:

All production and maintenance employees employed at the Employer's Cementville Plant located in San Antonio, Texas, including all employees in the Quarry Department, Shipping Department, Kiln Department, Finishing Mill Department, Slurry Mill Department, Powerhouse Department, Plant Office Department, Maintenance and Repair Department, Electrical Department, Laboratory Department, Oiler Subsection, as well as plant clerical employees, leadmen, truck-drivers and mechanics, excluding office clerical employees, order clerks, guards, watchmen, and supervisors as defined in the Act.

# APPENDIX C

**UNITED STATES OF AMERICA**
**BEFORE THE**
**NATIONAL LABOR RELATIONS BOARD**
**REGION TWENTY-THREE**

SAN ANTONIO PORTLAND CEMENT

*Employer*

AND

UNITED CEMENT, LIME AND GYPSUM WORKERS
INTERNATIONAL UNION, AFL-CIO

*Petitioner*

CASE NO. 23-RC-4611

BRIAN S. GREIG, ESQ.
FULBRIGHT & JAWORSKI
Bank of the Southwest Building
Houston, Texas 77002
ROBERT S. BAMBACE, ESQ.
FULBRIGHT & JAWORSKI
Bank of the Southwest Building
Houston, Texas 77002
(For Employer)

STEPHEN B. RUBIN, ESQ.
ASHER, GREENFIELD, GOODSTEIN, PAVALON & SEGALL, LTD.
Suite 1900
228 North LaSalle Street
Chicago, Illinois 60601

DON BILLUPS, INTERNATIONAL REPRESENTATIVE
UNITED CEMENT, LIME AND GYPSUM
WORKERS INTERNATIONAL UNION, AFL-CIO
317 East Elm
Skiatook, Oklahoma 74070
(For Petitioner)

ROBERT L. PENRICE, HEARING OFFICER

## HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS TO CONDUCT OF ELECTION AND CHALLENGED BALLOTS

Pursuant to a Stipulation for Certification Upon Consent Election entered into by the parties and approved by the Acting Regional Director on January 31, 1978, and Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, an election by secret ballot was conducted on March 17, 1978, under the direction and supervision of the Regional Director among employees in the bargaining unit set forth in the Stipulation. The Tally of Ballots served upon the parties immediately following the election disclosed the following results:

| | |
|---|---|
| Approximate number of eligible voters | 207 |
| Void ballots | 1 |
| Votes cast for Petitioner | 98 |
| Votes cast against participating labor organization | 72 |
| Valid votes counted | 170 |
| Challenged ballots | 39 |
| Valid votes plus challenged ballots | 209 |

The challenged ballots were sufficient in number to affect the results of the election.

On March 24, 1978, the Employer filed timely Objections to Conduct Affecting Results of the Election.[1]

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, an investigation of the challenged ballots and objections was conducted during which the parties were afforded full opportunity to submit evidence bearing on the issues. The Regional Director,

[1] On April 26, 1978, the Employer withdrew Objections Nos. 1 and 2 with the approval of the Regional Director.

finding that the challenged ballots and the Employer's Objection No. 3 raised substantial and material issues of facts, credibility and policy, issued and served upon the parties on April 27, 1978, his Order Directing Hearing and Notice of Hearing, in which he ordered that a hearing be held before a duly designated Hearing Officer for the purpose of taking evidence on the issues raised by the Employer's Objection No. 3 and the challenged ballots.

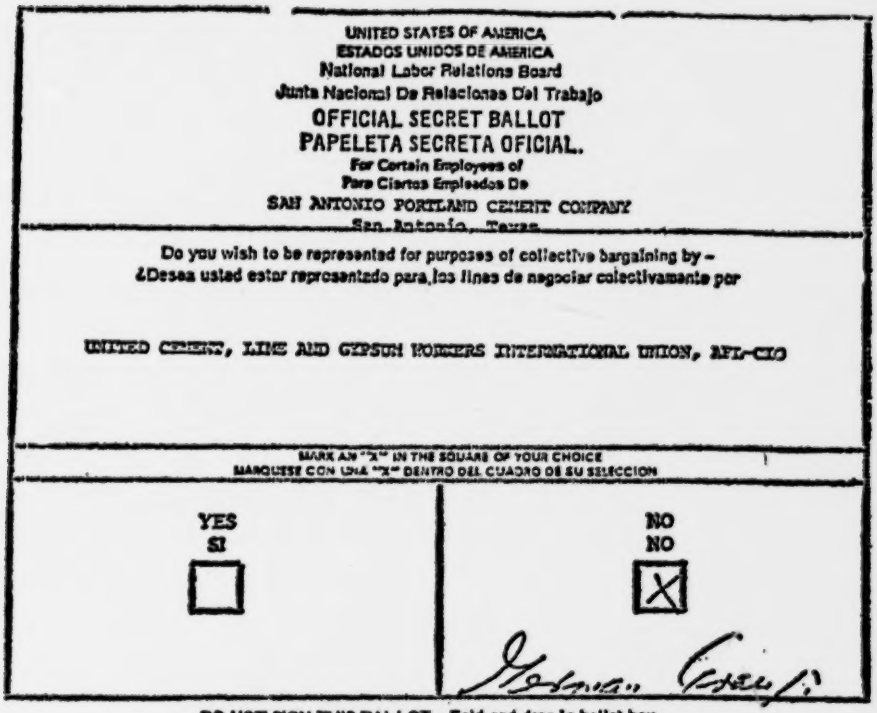
Pursuant to said Order, a hearing was held by the undersigned in San Antonio, Texas, on May 24 and 25, 1978, at which time the parties appeared in person and by counsel and were afforded the opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the close of the hearing the parties requested permission to file briefs, which permission was granted. The parties filed briefs with the Hearing Officer which have been carefully considered.

Based upon the entire record in this proceeding, I make the following findings and recommendations:

**The Challenged Ballots**

The Tally of Ballots discloses that 39 ballots were challenged. Included in that total is one ballot which was ruled void by the Board Agent because it contained certain markings sufficient to identify the voter. The Employer challenged the Board Agent's ruling. Consequently, the validity of that ballot is an issue in this proceeding.

The following is a photocopy of the ballot in question:



UNITED STATES OF AMERICA
ESTADOS UNIDOS DE AMERICA
National Labor Relations Board
Junta Nacional De Relaciones Del Trabajo
OFFICIAL SECRET BALLOT
PAPELETA SECRETA OFICIAL.
For Certain Employees of
Para Ciertos Empleados De
SAN ANTONIO PORTLAND CEMENT COMPANY
San Antonio, Texas

Do you wish to be represented for purposes of collective bargaining by -
¿Desea usted estar representado para los fines de negociar colectivamente por

UNITED CEMENT, LIME AND GYPSUM WORKERS INTERNATIONAL UNION, AFL-CIO

MARK AN "X" IN THE SQUARE OF YOUR CHOICE
MARQUESE CON UNA "X" DENTRO DEL CUADRO DE SU SELECCION

YES
SI
☐

NO
NO
☒

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
NO FIRME ESTA PAPELETA. Dóblela y deposítela en la urna electoral.
If you spoil this ballot return it to the Board Agent for a new one.
Si usted daña esta papeleta devuélvala al Agente de la Junta y pídale una nueva.

The Petitioner offered testimony indicating that an employee whose name is German Aranjo voted in the election. In its brief, Petitioner argues that the void ballot possibly bears that employee's signature. The Employer contends that the marking on the ballot is not a legible signature.

The Board has consistently held that a ballot is void if either the voter signs it or places upon it a mark by which he may be identified. *J. Brenner & Sons,* 154 NLRB 656; *George K. Garrett Company,* 120 NLRB 484; *Knapp-Sherrill Co.,* 196 NLRB 1072. Accordingly, without deciding whether the mark is the legible signature of any employee,

I find that it is sufficient to identify the voter. I recommend that the challenge to the foregoing ballot be sustained.

During the course of the hearing the parties stipulated that the challenges to the ballots cast by the following named individuals should be sustained for the reason set opposite their names:

| | | |
|---|---|---|
| 1. | Residio Trevino | Hired after eligibility date |
| 2. | George Mills | Supervisor |
| 3. | Efren Charles | Supervisor |
| 4. | Manuel Galindo | Supervisor |
| 5. | Henry Garcia | Supervisor |
| 6. | Hillary Huser | Supervisor |
| 7. | Richard Rodriguez | Supervisor |
| 8. | Sylvester Sarola | Supervisor |
| 9. | Rafeal Ebaban | Supervisor |
| 10. | Carlos Callazo (Callago) | Supervisor[2] |
| 11. | John Castillo | Supervisor |
| 12. | Louis Talbert | Supervisor |
| 13. | Randolph Prettyman | Supervisor |
| 14. | Robert DeLeon | Supervisor |

In addition the parties stipulated that the above-named supervisors possessed and exercised supervisory authority as set out in Section 2(11) of the Act. The Tally of Ballots discloses that 98 ballots were cast for the Petitioner and 72 against, with 39 challenges. Based upon the stipulation of the parties that 14 of the challenges should be sustained, I find the remaining challenges are insufficient in number to affect the results of the election.

**The Objections**

The Employer alleges in Objection No. 3 as follows:

> Supervisory employees within the meaning of Section 2(11) of the National Labor Relations Act had

[2] Spelling was corrected at the hearing.

> improper involvement with or rendered improper assistance to the organizational activities of the Union. The involvement or assistance includes, but not by way of limitation, executing and encouraging/soliciting others to execute authorization cards; attending and/or conducting union organizational meetings; and distributing union organizational and/or campaign material.

On March 16, the afternoon before the election, the Employer held a picnic near the swimming pool in the village for employees and management personnel. At that same time a group of employees who supported the Union held another picnic about 40 or 50 yards from the company's picnic. Both groups gathered in the residential area of the company's premises.

Gregory Fuentes, Curtis New and Joe Fernandez were seen wearing a Union "vote yes" button at the Union's picnic. In addition, the evidence discloses that Fuentes delivered 20 signed authorization cards to the Union and attended approximately 8 Union meetings.

It is the Employer's contention that Fuentes, New and Fernandez are supervisors within the meaning of Section 2(11) of the Act. Petitioner tells us they are not.

We turn to the facts and circumstances surrounding the supervisory status of these individuals.

**Gregory Fuentes**

The evidence discloses that Fuentes was classified as Carpenter & Utility Leadman at the time of the election. On the Employer's premises it has a section which is commonly known as the Village. The Village consists of about 80 houses which are available to employees as residences on a space available basis. The Village is not a part of the plant proper.

Fuentes together with a crew of 2 and sometimes 3 other men are responsible for keeping the Village houses repaired. They report to the superintendent or assistant superintendent's office each morning, at which time they pick up a work sheet covering the day's work. Although they work as a crew, each of these men possesses some skills in specific areas of construction, as Garcia is the plumber, Rios is the painter and Fuentes is the carpenter. When the work is completed one of them will indicate on the work sheet that it has been completed. Also, they may receive assignments directly from the Plant Manager.

Manuel P. Galindo, Plant Personnel Manager, testified in behalf of the Employer. Mr. Galindo testified that Fuentes was the highest hourly paid employee on the crew; that he had recommended a pay raise for an employee; requested specific individuals to be assigned to his crew; and that he prepared the work schedule and generally directed the work of the crew.

Fuentes was called as a witness by Petitioner to deny that he possessed or exercised any supervisory authority. Fuentes denied that he had been granted the authority to hire or fire employees, grant wage increases, lay off or recall employees and that he had never exercised such authority. He denied that he had authority to recommend such actions. He explained that he told management that a certain employee was a good worker. The record discloses that the employee received several raises but it is not established that either of these raises was granted as a result of a recommendation from Fuentes. Fuentes testified that it is Plant Superintendent Canchola who assigns the work and that he carries out Canchola's instructions. He further explained that during the preparation for the Christmas party, he would submit a list of names of people he would like to have assigned to work with him

on the project but Canchola would strike or add names as he desired.

In conclusion, I find Fuentes does not possess or exercise the authority to hire or fire, lay off, recall, promote or discipline employees or effectively recommend such action. I further find Fuentes as Chief Carpenter does not possess the authority to responsibly assign or direct the work of others except in routine matters requiring little or no independent judgment. *Walter J. Barnes Electrical Co.,* 188 NLRB 183 at p. 187. In that regard, I note that Plant Superintendent Raynaldo Canchola was called as a witness but never testified concerning the operation of the Village repair crew and the authority exercised by Fuentes. Fuentes reports directly to Canchola.[3]

Accordingly, I find Gregory Fuentes to be a leadman and his role in connection with the assigning and directing work of others is nothing more than that of a conduit for Mr. Canchola.

**Joe Fernandez and Curtis New**

The Employer maintains its power plant on its premises where it employs from 17 to 21 employees. The plant produces electricity for the Employer's entire operation. The plant operates 24 hours per day.

The personnel at the power house consists of four employees, four oilers on the main shift. There is an oiler and operator on each swing shift. There is a Chief Engineer, Efren Charles, an Assistant Chief Engineer, Curtis New, and Chief Diesel Engineer Operator, Joe Fernandez.

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[3] I find Fuentes' testimony to be more reliable than Galindo since he is more familiar with the day-to-day operation of the Village repair crew. Moreover, Raynaldo Canchola, Fuentes' immediate supervisor, did not dispute Fuentes' testimony concerning his lack of authority.

The supervisory status of Chief Engineer Charles is not in dispute. Both parties agree that Mr. Charles is in charge of the plant and has full supervisory authority. The status of Fernandez and New is the subject of our inquiry. The testimony reveals that Assistant Chief Engineer New is in charge of the plant when Mr. Charles is absent. He takes over for considerable time when Mr. Charles is on vacation or becomes ill. New receives a greater rate of pay than the other employees. Personnel Director Galindo's testimony disclosed that New recommended the transfer of certain employees and his recommendation was followed. Also, new prepares or participates in the preparation of the vacation schedules. Curtis New was not called as a witness.

On the other hand, Joe Fernandez, in his testimony, denies that he possesses or exercises any supervisory authority. Fernandez explains that his basic duty is to maintain the diesel engines. Fernandez' duties are specifically to start the big engines, oil them and perform whatever function necessary to offered to establish that the employees were led to believe the Employer favored the Union. Contrary to the Employer's contentions, I do not find New wearing the Union button on that one occasion coerced employees into giving their support to the Union. There is no evidence that New was an outspoken advocate for the Union; there is no evidence that he secured signatures on cards or even attended an official union meeting. Cf. *Sheraton Motor Inns,* 194 NLRB 733; *Fall River House,* 196 NLRB 74. Moreover, New's supervisory authority only extended over a very insignificant number of the total unit employees. Unlike the situation in *Lamar Electric Membership Corp.*, 164 NLRB 979, the principal authority relied upon by the Employer, New is a "low-level" supervisor. In *Lamar Electric, supra,* the plant superintendent called union meetings and made appeals to employees to join and

support the union. There is no evidence of similar conduct in this case. In my view, New's conduct is very similar to that of supervisor Mendez' conduct in *Gary Aircraft, supra.* Accordingly, I find New's conduct did not impair the employees' freedom of choice in the election. Therefore, I recommend that Objection No. 3 be overruled.

## CONCLUSIONS AND RECOMMENDATIONS

It is concluded that the challenge to the void ballot be sustained and it is so recommended.

Based upon the agreement of the parties that 14 of the challenges be sustained, it is concluded that the remaining challenges are insufficient in number to affect the results of the election. It is further concluded that Objection No. 3 is without merit and it is hereby recommended that the Board overrule Employer's Objection No. 3 and Certification of Representative issue.

Dated at Houston, Texas, this 13th day of July, 1978.

ROBERT L. PENRICE,
*Hearing Officer*
National Labor Relations Board
Region Twenty-three
One Allen Center, Suite 920
500 Dallas Avenue
Houston, Texas 77002

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Hearing Officer's Report and Recommendations on Objections to Conduct of Election and Challenged Ballots has been served upon each of the following by certified mail this 13th day of July, 1978.

CERTIFIED MAIL
Brian S. Greig, Esq.
Fulbright & Jaworski
Bank of the Southwest Building
Houston, Texas 77002

Robert S. Bambace, Esq.
Fulbright & Jaworski
Bank of the Southwest Building
Houston, Texas 77002

Stephen B. Rubin, Esq.
Asher, Greenfield, Goodstein, Pavalon & Segall, Ltd.
Suite 1900
228 North LaSalle Street
Chicago, Illinois 60601

Don Billups, International Representative
United Cement, Lime and Gypsum
Workers International Union, AFL-CIO
317 East Elm
Skiatook, Oklahoma 74070

. . . . . .

Robert L. Penrice,
*Hearing Officer*
National Labor Relations
Board
Region Twenty-three
One Allen Center, Suite 920
500 Dallas Avenue
Houston, Texas 77002

# APPENDIX D

# United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

March 10, 1980

MEMORANDUM TO COUNSEL OR
PARTIES LISTED BELOW:

No. 79-2576 —
NATIONAL LABOR RELATIONS BOARD
v.
SAN ANTONIO PORTLAND CEMENT COMPANY
(23-CA-7261)

---

Judgment Entered by: The Court

Gentlemen:

Pursuant to Rule 19 of the Federal Rules of Appellate Procedure, you are hereby notified that a judgment has this day been entered.

The mandate of the Court will issue after 21 days from this date, unless a timely petition for rehearing under Rule 40 or application for stay under Rule 41 is filed.

Very truly yours,

GILBERT F. GANUCHEAU, *Clerk*

By Brenda Hauck
*Deputy Clerk*

cc: (Judgment)

Messrs. Elliott Moore
James Callear
Messrs. Edwin H. Benn
Stephen B. Rubin
Messrs. Brian S. Greig
Robert S. Bambace
Mr. Louis V. Baldovin, Jr.

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19..

No. 79-2576
SUMMARY CALENDAR

N. L. R. B. NO. 23-CA-7261
NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

VERSUS

SAN ANTONIO PORTLAND CEMENT COMPANY,

*Respondent.*

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before GODBOLD, REAVELY AND ANDERSON, CIRCUIT JUDGES.

## JUDGMENT

This cause came on to be heard on the National Labor Relations Board's application for enforcement of its order, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said National Labor Relations Board in this cause be, and the same is hereby, enforced;

IT IS FURTHER ORDERED that the respondent pay to the petitioner the costs on appeal, to be taxed by the Clerk of this Court.

February 15, 1980

ISSUED AS MANDATE:

# APPENDIX E

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 79-2576

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

VERSUS

SAN ANTONIO PORTLAND CEMENT COMPANY,

*Respondent.*

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

## ON PETITION FOR REHEARING

**(April 8, 1980)**

Before GODBOLD, REAVELY AND ANDERSON, CIRCUIT JUDGES.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

. . . . . .

*United States Circuit Judge*